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No. 99-1554

IN THE

Supreme Court of the United States

JOHN ARENA AND MICHELLE WENTWORTH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

STASIA ZOLADZ VOGEL*
6540 OLD LAKE SHORE ROAD
DERBY, NY 14047
(716) 947-9126

CARL F. GUY
850 FAY ROAD
SYRACUSE, NY 13219
(315) 488-2933

Attorneys for the Petitioners

**Counsel of Record*

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ARGUMENT

The Second Circuit has construed the federal Hobbs Act, 18 U.S.C. § 1951, so broadly as to equate all unlawful social protest activity with criminal "extortion." Pet. at 1-7.

The occasion for this huge, unwarranted expansion of federal "extortion" was the release of smelly butyric acid in an attempt to shut down (at least temporarily) two abortion businesses. Petitioners were subsequently charged, convicted, and sentenced in state court for the two acts of vandalism. Dissatisfied with petitioners' sentences (five years probation),

the federal government prosecuted petitioners for "extortion." Pet. at 2-3; Opp. at 4.

The decision below dramatically threatens the vitality of all social protest and civil disobedience in this country. Not only are federal prosecutors now armed with felony extortion charges against the disfavored protesters *du jour*, but the political enemies of such protestors are armed with civil RICO predicated upon supposed "extortion" charges. *See* Pet. at 3-4; 18 U.S.C. § 1961(1) (listing Hobbs Act, 18 U.S.C. § 1951, among predicate acts for RICO). Civil RICO is already being employed offensively in precisely the context of political strife. *See* Pet. at 4 (listing examples).[1]

The government's efforts to pooh-pooh these concerns lack merit.

Hobbs Act extortion requires "the obtaining of property from another, with his consent, induced by wrongful use of

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[1]Two such cases are currently pending before the Seventh and Ninth Circuits. *See NOW v. Scheidler*, 1999 WL 571010 (N.D. Ill. July 28, 1999), *appeal pending*, Nos. 99-3076, 3336, 3891, 3892 (7th Cir. argued Sept. 14, 2000); *Planned Parenthood of Columbia/Williamette Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996), *later decision*, 23 F. Supp. 2d 1182 (D. Or. 1998), *later decision*, 41 F. Supp. 2d 1130 (D. Or. 1999), *appeal pending*, Nos. 99-35320, 35325, 35327, 35331, 35333, 35405 (9th Cir. argued Sept. 12, 2000).

actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951. The court below essentially rewrote the Hobbs Act to dispense with these elements.

1. No "property"

Petitioners obtained no "property." Pet. at 16-17. At most, petitioners interfered with the use or enjoyment of property, which is not a RICO injury. *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783 (9th Cir.), *cert. denied*, 506 U.S. 1020 (1992).

The government contends that the question of the scope of the term "property" is not properly presented. Opp. at 5-6. But the Second Circuit squarely addressed this issue, Pet. App. at 15a-19a, and held that "property" includes "the intangible right to conduct business free from threat of violence and physical harm," *id.* at 20a.[2]

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[2]By defining "property" to include a right to be free of the alleged wrongful conduct in question, the Second Circuit engaged in tautological reasoning. By definition, all wrongful force will obtain "property," if property means freedom from such force. *See id.* at 21a ("where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act").

The right to conduct a business can, in appropriate circumstances, qualify as property under the Hobbs Act. For example, a mobster who takes over a competitor's trash hauling business by threats or violence obtains "property." But that is because the thing obtained is "property" for the mobster. The Pax Christi demonstrators, by contrast, who block access to a munitions factory do not seek a share of the weapons business, and thus they do not obtain any such property. The bar brawler who slugs a romantic rival obtains no "property" even if the victim misses work from the bruises. Any tort will have some impact on economic matters, if it be only the price of repair. This does not mean all torts obtain "property" for purposes of Hobbs Act extortion.

Petitioners in this case allegedly obtained a temporary halt in the practice of abortion. In so doing, petitioners no more obtained "property" than any other striker or demonstrator obtains "property."

2. No "obtaining"

The government, like the Second Circuit, would replace the "obtaining" of property with making someone "abandon" some practice conducted on the property. Pet. App. at 21a; Opp. at 7. But *all* protest activity "forces the victim to choose between abandoning his property rights or suffering the

consequences." Opp. at 7. This is not a limiting definition but a limitless definition. Nor is the government's invocation of "violence" relevant -- the "obtaining" element does not require violence; moreover, the defendants here were only charged with the creation of a stench.

The court below completely ignored the crucial distinction between threatening a blockade unless the proprietor *accedes to a political demand* (e.g., stop selling sweatshop products) and threatening a blockade unless the proprietor *makes a payoff*. The key difference is the "obtaining" of property. Pet. at 15.

3. No "consent"

The Second Circuit held that an attempt to influence another's behavior satisfies the "consent" element of extortion. Pet. App. at 22a. Thus, the court below converted a protected political goal -- the desire to stop abortion -- into an element of criminal extortion. *See* Pet. App. at 19a (citing participation of petitioners in numerous protests as evidence of goal to shut abortion business down), 22a (citing goal of stopping abortion as satisfying consent element). This logic threatens all protest movements.

4. No "force, violence, or fear"

The Second Circuit held that release of potent smells counted as force, violence, or fear. Pet. App. at 22a-25a.[3] The government concurs. Opp. at 11. By lowering the threshold of this element so low, the court below again threatens all protest movements. Pet. at 19-20.

5. No "wrongful" purpose

Shutting down abortion is a legitimate goal, even if hotly contested (as were the goals of civil rights protesters). *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Hence, the "wrongfulness" element of extortion is not satisfied. Pet. at 20-22.

The government asserts a waiver of this argument, Opp. at 11, but it is undisputed that a consistent issue throughout this litigation has been the satisfaction *vel non* of the elements of extortion. To claim waiver of a particular subargument is to exalt rigid formalism over plain substance.

On the merits, the government argues that only a claim of right to the property in question can defeat the wrongfulness

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[3]By this logic, a street person with poor hygiene commits "extortion" by sitting or standing next to someone (forcing another, by powerful smell, to abandon some use of property). Indeed, pig farms and sanitation facilities regularly engage in "force, violence, or fear" under this faulty approach.

element. Opp. at 11-12. The Supreme Court, however, made no such artificial limitation in *United States v. Enmons*, 410 U.S. 396 (1973). Rather, the Court looked to the presence of *legitimate objectives*, *id.* at 400, even in the face of conduct far more violent that the release of smells at issue here, *id.* at 398.

CONCLUSION

The Second Circuit would convert any protest activity that crosses the tiniest legal line into federal criminal extortion and racketeering. Such an approach leaves no "breathing space" for the First Amendment, especially for politically disfavored groups. This dangerous precedent cannot be left standing in a nation that prides itself on a heritage of nonviolent civil disobedience. This Court should grant certiorari.

Respectfully submitted,

Stasia Zoladz Vogel*
6540 Old Lake Shore Road
Derby, NY 14047
(716) 947-9126

Carl F. Guy
850 Fay Road
Syracuse, NY 13219
(315) 488-2933

Attorneys for Petitioners

*Counsel of Record